SALLY CHAN KIT TONG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CRIMINAL APPEAL NO. 52-108 OF 1988]
20 DECEMBER 1989

WORDS AND PHRASES: *Definition of public officer - Under counter money for purchase of house - Whether 'gratification' - Contention by defence that the offence is unclear - Laissez faire system of trade and commerce - Whether appellant restrained by law.*

The appellant in this case was originally charged under s. 4(a) of the Prevention of Corruption Act 1961, however at the end of the prosecution's case, the prosecution tendered an amended charge under s. 3(a)(1) of the Act. She was found guilty and was convicted. The prosecution case arose out of a complaint that the appellant accused demanded the payment of RM15,000 as under - counter money for the purchase of a house.

Held:
The demand and receipt of under counter payment by someone who is not a public officer and in the absence of any price restriction imposed by law is clearly devoid of any element of corruption and therefore is not a gratification under the Prevention of Corruption Act 1961.

[Appeal allowed]

Case referred to:
Rattan Singh [1971] 1 MLJ 1627

Legislation referred to:
Prevention of Corruption Act 1961, ss. 3(a)(i), 4(a), 13, 14

For the appellant - Christopher Fernando; M/s. Gunarethnam & Co.
For the respondent - Mohamed Shariff bin Abu Samah, DPP (BPR)

JUDGMENT

Mustapha Hussain J:

The appellant in this appeal is a crippled woman in a wheel chair aged 53 years. She was charged before the Sessions Court under s. 3(a)(1) of the Prevention of Corruption Act 1961, and the learned President convicted her on the charge and she was sentenced to one day's imprisonment and fined RM6,000 in default one year's imprisonment. She was also ordered to pay RM15,000 as penalty under s. 13 of the same Act within one week but this was stayed pending the outcome of appeal.

The appellant was originally charged under s. 4(a) of the Prevention of Corruption Act 1961, and the charge read as follows:

> That you on 23 February 1983 at about 3.15p.m. at the office of Sally Development and Realty Sdn. Bhd. No. 22 Taman Bunga Raya, Mantin, in the District of Seremban, in the State of Negeri Sembilan, being an agent of Sally Development & Realty Sdn. Bhd., to wit, managing director did corruptly accept for yourself a gratification, to wit, fifteen thousand Ringgit (RM15,000), from one Tan Chong Hin as an inducement to do an act, in relation to

your principal's affairs, to wit, to facilitate the signing of the "loan agreement" and the "sale and purchase agreement" between Sally Development and Realty Sdn. Bhd., and the said Tan Chong Hin pertaining to the purchase of a low-cost house under Lot 5719, Taman Maju, Mantin, from the said Sally Development & Realty Sdn. Bhd., and that you have thereby committed an offence punishable under s. 4(a) of the Prevention Corruption Act No. 42/1961 (Laws of Malaysia Act No. 57 of 1971).

At the end of the prosecution's case, the prosecution tendered an amended charge under s. 3(a)(1) of the Prevention of Corruption Act 1961, which read as follows:

That you on 23 February 1983, at about 3.15 p.m. at No. 22, Taman Bunga Raya, Mantin, in the District of Seremban, in the State of Negeri Sembilan did corruptly receive for Sally Development & Realty Sdn. Bhd., a gratification, to wit, fifteen thousand ringgit (RM15,000) from one Tan Chong Hin as an inducement to you doing something in respect of a matter proposed to take place, to wit, *to* confirm the booking of a double storey low cost house to the said Tan Chong Hin and that you have thereby committed an offence punishable under s. 3(a)(1) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act No. 57)

The prosecution arose out of the complainant Tan Chong Hin (PW2) who with his sister wanted to purchase a low cost house from Sally Development & Realty Sdn. Bhd., on 2 January 1982. The price of the house was RM49,000 and the appellant told the complainant an under-counter money of RM15,000 had to be paid. The complainant agreed to pay this RM15,000 under-counter money which was separate from the RM49,000 which was the price of the house. Complainant issued a post-dated cheque for RM1,000 for the booking fee.

The complainant was then 22 years old, a company executive earning about RM400 to RM500 per month, of no fixed employment and unemployed at the time of the trial.

The complainant had no money to go through with the purchase and fearing he would lose the RM1,000 booking fee which he had paid, he lodged a report with the Anti-Corruption Agency one year later. The house he had earlier booked to buy was sold by the appellant and as complainant had pleaded for a house, another house was allotted to him.

This "RM15,000 under-counter money" is then the subject matter of the offence.

From the notes of evidence, certain aspects of the case are undisputed:

(1) The appellant was the alter ego of the Sally Development & Realty Sdn. Bhd. She owned 99% of the share capital while the other only director (PW11) owned the nominal 1%. According to this nominal director PW11, the appellant had the sole power to increase or reduce the price of the houses as she liked. All takings whether receipted or not, were paid into the company's account which are audited (according to PW11 the other nominal director).

(2) The complainant in his evidence clearly stated that he had lodged the report fearing that he would lose his RM1,000 which he had paid for the booking of the house. He also said he wanted to teach the appellant a lesson. He lodged the report one year after the demand for under-counter money was made by the appellant. There is ample evidence to show that complainant had an ulterior motive in lodging the report. If compared to *Rattan Singh* [1971] 1 MLJ 1627, complainant's conduct or "game" is in the senior league division one while Rattan Singh is in the 4th division (analogy and apology to the English Football League). There is also evidence that complainant is a very unreliable witness who changed his evidence many times when caught in cross-examination.

(3) Even on the trap day when complainant paid RM10,000 as the first payment for the house (apart from the RM15,000 trap money) complainant paid in a cheque when he did not have that much money in the bank, which may be an offence by itself.

(4) The RM15,000 trap money was indeed handed over to the appellant on 23 February 1983 for which no receipt was given. There is clear evidence and corroboration that the RM15,000 under-counter money was indeed asked for by the appellant and this evidence is further strengthened by the tape recording.

(5) Though there was an agreement between the appellant's company and the State Government of Negeri Sembilan on the price ceiling of houses built by appellant's company, according to the former State Legal Adviser of Negeri Sembilan, who was called as a witness for the defence (DW3), this agreement was not valid as there was no law to make it binding on the appellant's company to conform to the price limitations.

(6) As far as the booking of the house by the complainant with the appellant's company is concerned, the Housing Developers (Control and Licensing) Regulations 1982, did not apply as the Regulations came into force in April 1982, whereas the complainant made the booking in January 1982.

(7) The appellant is not a "public officer" as defined in the Prevention of Corruption Act 1961, and the presumption under s. 14 does not apply.

Many grounds were put forward and argued admirably by appellant's Counsel.

(a) Offence Unknown to the Law

The gist of the offence of which the appellant was convicted was *"to confirm the booking of a double storey low cost house"* which was already booked way back on 4 January 1982. The complainant had paid RM1,000 to "book" the house and he was given a receipt (P3), where it was written "Registration Fee". Registration and booking are synonymous as far as buying a house is concerned. The receipt itself already confirmed the booking. What confirmation is now required? On this ground alone, the conviction cannot stand. From the original charge and the amended charge which was tendered at the close of the case for the prosecution, clearly the prosecution was not at all sure as to what offence the appellant was to be charged with.

(b) Is under-counter money a gratification?

The appellant is not a "public officer". There is no law to prevent the appellant from selling her house at any price, at a price higher or lower than the price she had advertised. Our trade and commerce are based on a laissez-faire concept of free enterprise unless constrained by law on the pricing e.g. essential foodstuffs.

The appellant was not selling first day cover stamps like a postal clerk who if an under-counter payment or extra payment is demanded, clearly makes it a bribe or gratification, if the postal clerk asks for RM1 extra and takes this RM1 over and above the price of the first day cover stamps. The appellant here was under no legal constraint, albeit the validless agreement her company had with State Government the terms of which were not binding on her, to adhere and conform to the prices she had originally advertised. If the complainant does not agree to make the under-counter payment demanded by the appellant for the house booked, don't buy the house. Go elsewhere to buy one. In any event, complainant happily agreed to pay this under-counter money. He only changed his mind after one year and his conduct from then on of going out of his way to teach the appellant a lesson out-Rattaned (our old friend Seremban Singh) when he ran out of cash.

This demand and receipt of under-counter payment by someone who is not a public officer and in the absence of any price restriction imposed by law, is clearly devoid of any element of corruption and therefore is not a gratification under the Prevention of Corruption Act 1961. No doubt there is the element of profiteering which is not an offence under the Prevention of Corruption Act 1961. This is part and parcel of a free economy and trade. A trader or businessman like the appellant here, who is not a government officer, can sell his or her goods at any price, unless the price is controlled or restricted by law to a certain level. It is the ruling of this Court that any demand and receipt of under-counter money, over and above the prices already advertised, in the circumstances of this case, cannot be a gratification under the Prevention Corruption Act 1961. May be it is an offence if the receipt of such under-counter money is not disclosed in the annual accounts, under Income Tax Act, to evade tax.

It is common knowledge that housing developers have to entertain, have to pay some people without getting receipts to succeed in their projects and probably they have to ask for under-counter payment for the sale of their houses in order to balance their accounts. Ask any solicitor who is involved in housing projects, in getting permits, licences, applications for sub-division, approval of building plans and end-financing from banks, he would be able to explain these unreceipted "entertainments" prevalent during the housing boom and fortunately much less prevalent now.

The appeal is therefore allowed. Conviction is set aside and sentence quashed. Fine and penalty if paid, to be refunded to the appellant.

Also found at [1990] 1 CLJ 330